Supreme Court, U.S.
FILED
NOV 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARIAN W. SHORT,
Petitioner,

VS.

BELLEVILLE SHOE MANUFACTURING COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

ALAN C. KOHN
(Counsel of Record)
ROBERT T. HAAR
ROBERT A. USETED
KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM
One Mercantile Center
24th Floor
St. Louis, Missouri 63101
(314) 241-3963

Counsel for Petitioner

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

TABLE OF CONTENTS

Table of Authorities Cited iii

Petitioner's Reply Brief 1

Conclusion 6

TABLE OF AUTHORITIES CITED

Page(s)

Cases:

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 4

Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959) 3

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 5

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 4

Lampf Pleva Lipkind Prupis & Petigrow v. Gilbertson, No. 90-333, *cert. granted*, October 9, 1990 .....*passim*

Wilson v. Garcia, 471 U.S. 261 (1985)..... 4

Statutes and Rules:

Securities Act of 1933, §12(2), 15 U.S.C. §77*l*..... 5

Securities Act of 1933, §13, 15 U.S.C. §77m 2

Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5 1,4,5

42 U.S.C. §1981 4

42 U.S.C. §1983 4

42 U.S.C. §1988 4

No. 90-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARIAN W. SHORT,
Petitioner,

vs.

BELLEVILLE SHOE MANUFACTURING COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

On October 9, 1990, subsequent to the filing of the Petition in the instant case, the Court granted the Petition for a Writ of Certiorari to the Ninth Circuit in *Lampf Pleva Lipkind Prupis & Petigrow v. Gilbertson*, No. 90-333. Like this case, *Lampf* raises the issue of the appropriate statute of limitations and the appropriate tolling period in a federal civil action under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.

This Petitioner has been informed by the Clerk of the Court that the *Lampf* case is likely to be set on the Court's calendar in

approximately February, 1991. For the following reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in the instant case should be granted and that this case should be set for oral argument at the same time as the *Lampf* case:

1. The instant case was decided on a motion to dismiss. The district court found (App. A-25) that Plaintiff Marian W. Short, Petitioner herein, had pleaded facts entitling her to the benefit of federal equitable tolling because Petitioner alleged, and stands ready to prove, that Respondents had actively and fraudulently concealed their wrongful acts from her, and that Petitioner therefore did not know, nor could she have known, of those wrongful acts until shortly before suit was filed. That finding was left undisturbed by the Seventh Circuit opinion. In the *Lampf* case, the matter of notice was submitted on a motion for summary judgment, and the facts with regard to notice of wrongdoing could resolve the case without the necessity of deciding the underlying legal issues. For example, if the Court were to decide in *Lampf* that the undisputed facts show that the plaintiffs received the Lawrence Reports shortly after their purchases from 1979 to 1981 and that this constituted notice of wrongdoing as early as October of 1982 (as the district court found), then the statute of limitations ran not later than October 1984. Suits filed in December 1986 and June 1987 would be barred regardless whether the Court applies the two-year Oregon statute or the one-year federal statute contained in Section 13 of the Securities Act of 1933, and regardless whether the federal doctrine of equitable tolling or the absolute three-year statute of repose prescribed by the federal statute is applied.

In the instant case, however, it is undisputed that facts giving rise to equitable tolling have been properly pleaded and, therefore, this Court must decide whether federal equitable tolling applies or whether the three-year absolute statute of repose applies. It is therefore important that the Petition in this case be

granted and that this case be argued alongside *Lampf* in order to assure a definitive ruling on this important question of federal law.

2. Petitioner (defendant) in the *Lampf* case relied extensively on Judge Easterbrook's Seventh Circuit opinion in this case to support the granting of a writ of certiorari. See Supplemental Brief of *Lampf* at pages 2-6. It is this Petitioner who has been directly and adversely affected by the Seventh Circuit's opinion, and Petitioner wishes that her lawyer be given an opportunity to explain why Judge Easterbrook's opinion is incorrectly decided and has worked a hardship on her.

3. The Petitioner in *Lampf* is the defendant, while the Petitioner in this case is the plaintiff. It is important for the proper presentation of the issues in these cases that there be a juxtaposition of plaintiffs and defendants because it will enable the Court to fully understand the factual contexts in which cases of this kind arise. In the instant case, Petitioner was victimized by her brother in a stock transaction involving a closely-held family business. The brother, Homer Weidmann, totally controlled Petitioner's financial affairs and held her power of attorney so that Petitioner was not in a position to discover his wrongdoing until shortly before suit was filed. The facts of this case present a paradigm of why the maxim that "no man may take advantage of his own wrong" should be upheld. *See Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959) (footnote omitted). The equities inherent in the doctrine of equitable tolling and equitable estoppel are strongly present in the instant case, and Petitioner believes it is important that those equities be directly brought to the attention of the Court by her lawyer in the course of deciding the underlying legal issues.

In their Brief in Opposition, Respondents concede that the Court's decision in *Lampf* will determine whether the Seventh Circuit's analysis in the instant case was correct. Respondents' conclusion that the instant petition should be denied is,

therefore, unsound. While, for the reasons stated above, Petitioner submits that her Petition should be granted and the two cases should be argued side by side, at the very least, the Petition in this case should be held for determination in light of *Lampf*.

Moreover, Respondents' reasons for denying the writ do not withstand analysis. Respondents contend that they will prevail in any event because even if the Seventh Circuit was incorrect and state law supplies the appropriate limitations period, the five-year Illinois statute of repose will nevertheless bar Petitioner's claims. The fundamental flaw in this contention is that, under a long line of cases in the various circuits, which decisions have been acquiesced in by Congress, state law furnishes the appropriate limitations period, but the federal doctrine of equitable tolling determines when that period begins to run. See Petition, Parts IIC and D, pp. 21-26. The Illinois statute of repose is a red herring.

Respondents' argument that three civil rights cases, *Wilson v. Garcia*, 471 U.S. 261 (1985), *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), mandate the application of state statutes of repose, is simply incorrect. All three of these cases were brought under Reconstruction civil rights statutes, namely, 42 U.S.C. §§1981 and/or 1983. These statutes are, in turn, affected by 42 U.S.C. §1988, which provides that in adjudicating civil rights claims, the courts are to apply federal law to the extent it is suitable, and if there is no suitable federal law, the courts must apply the "common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held." The *Wilson* Court held that 42 U.S.C. §1988 directed the courts to apply state tolling principles to claims under these civil rights statutes. But 42 U.S.C. §1988 has no application to §10(b) of the Securities Exchange Act of 1934, and therefore *Wilson v. Garcia* is inapposite. *Wilson, Tomanio* and *Johnson* simply did

not, as Respondents would have it, overrule *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), nor did they overrule other cases holding that the federal doctrine of equitable tolling is "read into every federal statute of limitation." This doctrine has been routinely applied to cases under §10(b) (see pp. 10-11 and 23-26 of Petition), and principles of *stare decisis* and the acquiescence of Congress require that this rule be maintained unless Congress dictates otherwise.

Finally, Respondents' footnote 6, citing legislative history for the proposition that Congress did not intend equitable tolling to be read into securities law limitations periods, is well off the mark. Congress was considering limitations provisions for statutes *other than* §10(b)[1] during this debate; subsequently, the courts implied the existence of a private civil remedy under §10(b), and began to apply the federal doctrine of equitable tolling to actions brought thereunder. Congress has acquiesced in this practice over a period of several decades, and the result urged by Respondents would amend the statute by judicial fiat. The Court should eschew this invitation to legislate.

---

[1] The existence of a private right of action under §10(b) was implied by the courts years later and not expressly created by Congress, so obviously Congress was not considering §10(b) actions in the debate cited by Respondents. Moreover, as Petitioner pointed out in part IIB of her Petition, it is inappropriate to borrow the limitations and repose provisions of a statute not requiring proof of scienter (like §12(2)) for use in a cause of action that does require scienter (like §10(b)), because the result rewards the perpetrator of a fraud for continuing to conceal the fraud.

CONCLUSION

Petitioner respectfully prays that the Petition for a Writ of Certiorari to the Seventh Circuit be granted and that this case be set for oral argument at the same time as *Lampf*. In the alternative, this Petition should be held pending the Court's decision in *Lampf*.

Respectfully submitted,

KOHN, SHANDS, ELBERT,
GIANOULAKIS & GILJUM

ALAN C. KOHN
Counsel of Record

Robert T. Haar
Robert A. Useted
One Mercantile Center
24th Floor
St. Louis, Missouri 63101
(314) 241-3963

Counsel for Petitioner